UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1382

ESTATE OF TARIK K. RODGERS, by and through his Administrators, Michael Rodgers and Brenda Rodgers; MICHAEL RODGERS, as parent of the decedent; BRENDA RODGERS, as parent of the decedent,

Plaintiffs - Appellants,

versus

STEVE SMITH, individually and in his official capacity as Chief of Police of the City of Williamston Police Department, North Carolina; KEITH ROACH, individually and in his official capacity as the Sheriff for Martin County; WALTER J. FARROW, III, individually and in his official capacity as a Martin County Deputy Sheriff; WILLIAM R. WATERS, JR., individually and in his official capacity as a Williamston North Carolina police officer; MELANIE COX, individually and in her official capacity as a Williamston North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston North Carolina police officer; ELVIE FORNEY III, individually and in his official capacity as a Williamston North Carolina police officer; SCOTT MCFARLAND, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston North Carolina police

officer; TRAVIS COWAN, individually and in his official capacity as a Williamston North Carolina police officer; STACEY PIPPIN, individually and in his official capacity as a Williamston North Carolina police officer; DAVID CROSS, individually and in his official capacity as a Martin County Deputy Sheriff; THE CITY OF WILLIAMSTON, NORTH CAROLINA,

Defendants - Appellees,

and

DONNIE PITTMAN, individually and in his official capacity as the County Manager for Martin County, North Carolina; MARTIN COUNTY, NORTH CAROLINA,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Malcolm J. Howard, District Judge. (CA-03-44-4-H)

Argued: December 1, 2005 Decided: June 26, 2006

Before WILKINS, Chief Judge, GREGORY, Circuit Judge, and Walter D. KELLEY, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Chief Judge Wilkins wrote the majority opinion, in which Judge Kelley joined. Judge Gregory wrote an opinion concurring in part and dissenting in part.

ARGUED: Teresa Louise Smallwood, Windsor, North Carolina; Robert Arlington Berry, Harrisburg, Pennsylvania,

for Appellants. **ON BRIEF**: Gary S. Parsons, BAILEY & DIXON, Raleigh, North Carolina;
Mark Allen Davis, WOMBLE, CARLYLE, SANDRIDGE & RICE, Raleigh, North Carolina, for Appellees. **ON BRIEF**: K. Jameson Lawrence, Baltimore, Maryland, for Appellants. Gavin B. Parsons, BAILEY & DIXON, L.L.P., Raleigh, North Carolina, for Appellees S. Smith, W. R. Waters, M. Cox, C. Brown, E. Forney, B. Hardison, T. Cowan & City of Williamston.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)
.WILKINS, Chief Judge:

The Estate of Tarik K. Rodgers (the Estate) brought this federal civil rights action, see 42 U.S.C.A. § 1983 (West 2003). claiming violations of the Fourth Amendment in connection with the death of Tarik Rodgers (Rodgers). The Estate now appeals a decision of the district court granting summary judgment, on the basis of qualified immunity, to certain of the defendants.[1] For the reasons set forth below, we affirm.

I.

The pertinent facts, viewed in the light most favorable to the Estate, see Wilson v. Flynn, 429 F.3d 465, 466 (4th Cir. 2005), are as follows. On April 14, 2002, a Martin County, North Carolina Sheriff's deputy served a

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[1]The district court had previously dismissed other claims against these defendants and the claims against other defendants. The Estate does not appeal those dismissals.

restraining order on Rodgers. The order prohibited Rodgers from coming into contact with his girlfriend, Angela Freeman, and their two children.

At approximately 10:00 that evening, Rodgers drove to Freeman's house and abducted her at gunpoint. He drove her to a remote area, where they discussed the protective order. After resolving their differences, they engaged in consensual sex. Rodgers was upset about his conduct that evening and wondered aloud to Freeman how he was going to explain himself to their children. At one point he asked Freeman to shoot him, but she refused.

Around midnight, Rodgers drove by Freeman's home to see if any police officers were there. (Although Rodgers had warned those present in Freeman's home not to call the police, the police had nevertheless been contacted and informed that Rodgers had abducted Freeman at gunpoint.) Rodgers eventually passed a patrol car and "took off." J.A. 93 (internal quotation marks omitted). A high-speed chase ensued that involved Martin County Deputy Sheriff Walter Farrow and City of Williamston, North Carolina police officers William Waters, Elvie Forney, Melanie Cox, and Charles Brown. The chase, which continued until nearly 2:00 a.m. on the morning of April 15, was later joined by Scott McFarlane, a plain clothes narcotics officer from another jurisdiction. The officers engaged in the chase were aware that Rodgers had abducted Freeman and that he was considered armed and dangerous.

Rodgers ended the chase by stopping abruptly in a parking lot, causing Officer Waters to crash into the rear of Rodgers' vehicle. Officer Waters exited his vehicle with his

trained police dog. Officer Waters released the dog, which mistakenly attacked Officer McFarlane, biting him on the left leg.

As Officer Waters was commanding the police dog to release Officer McFarlane, Rodgers was attempting to exit his vehicle through the damaged driver's side door, and the other officers who had been involved in the chase were approaching Rodgers' vehicle. Freeman, who was still in the passenger seat of the automobile, heard Rodgers saying "holdup" as he tried to get out. Id. at 109. Rodgers had his hands up and, at that point, had nothing in them. However, Freeman did not notice whether Rodgers' weapon, which had been between his seat and the center console, was still there. As Rodgers emerged from the car, Freeman could only see his left side, not his right.

Officer Brown grabbed Rodgers by the shirt to get him out of the car. Rodgers did not have a weapon at that time, but as Brown was pulling him out of the vehicle, Rodgers leaned back in and grasped his firearm. Officer Brown yelled "Gun!" and backed away from the vehicle. Officer Waters heard this warning and saw Rodgers emerging from his vehicle. Officer Waters did not see a Weapon,[2] but he observed that Rodgers had his right

[2]The record contains three evidentiary items concerning Officer Waters' observations: the State Bureau of Investigation (SBI) statement he made shortly after the incident, an affidavit sworn in late November 2004, and a transcript of his deposition testimony, given in October 2004. The affidavit indicates that Officer Waters saw Rodgers with a firearm before he deployed the police dog, while the SBI statement indicates that he did not see the weapon until after the deployment. Officer Waters' deposition testimony (at least the portion included in the record) does not directly address this topic. We assume the truth of the SBI statement, as that is most favorable to the

hand under his shirt. Deputy Farrow, however, did observe Rodgers emerge from his vehicle with a firearm in his right hand. Officer Waters deployed the police dog, which initially engaged Rodgers by the arm. Officer Waters then then saw Rodgers point the firearm at him (Officer Waters). In the ensuing seconds, Officer Waters and Deputy Farrow fired their weapons. Bullets from Officer Waters' firearm struck Rodgers multiple times, killing him.

Some of the events surrounding the shooting were captured on videotape by a camera located in Officer Forney's patrol vehicle. The recording begins as Officer Forney turns his vehicle to approach the crash scene. Officer Forney stopped behind Deputy Farrow's vehicle, thus placing Deputy Farrow's vehicle between the video camera and Rodgers' and Officer Waters' vehicles.

At 1:50:56 on the recording, Deputy Farrow can be seen in the center of the screen, climbing up the side of his vehicle from behind the open driver's side door. (He later testified that he was trying to stay out of the way of the police dog.) Officer McFarlane is to the left of Deputy Farrow's vehicle, crouched on the ground with his firearm in his right hand. At 1:51:01, Officer Waters comes into view from the left of the screen with the police dog. Officer Waters brings the dog forward a few feet and releases it, at which point the dog is out of view in front of Deputy Farrow's vehicle. Having released the dog, Office Waters moves forward a few more steps and appears to be quite close to Rodgers.

Estate.

As Officer Waters deploys the dog, Rodgers can be seen. Because of the location of Deputy Farrow's vehicle with respect to the video camera, Rodgers at first is viewable only through the back and front windshields of Deputy Farrow's vehicle. He appears to be leaning slightly forward, and his arms are contrasted against the white shirt he is wearing. At 1:51:03, Rodgers appears to rise up, raising his left arm. Deputy Farrow is standing on the ground behind the driver's side door of his vehicle, and Officer McFarlane is kneeling a few feet to the left. Both officers have their weapons drawn. At 1:51:04, Rodgers' left arm has come down and he is falling backward, evidently having been engaged by the police dog, Officer McFarlane

McFarlane is now standing on his uninjured right leg. At 1:51:06, Rodgers is out of view, Officer Brown is backing away, and Officer McFarlane has advanced a small distance. Officer Forney comes into view on the left, behind the other three officers.

Rodgers appears again at 1:51:07, coming toward the officers as he falls. Rodgers has moved to the left of Deputy Farrow's vehicle and is no longer obscured by it. He is moving sideways and is facing the video camera; thus, he is falling to his right, toward the officers. Two muzzle flashes can be seen as Officer Waters draws and fires his weapon. As Rodgers falls to the ground, his firearm can be seen leaving his hand and landing a few feet away. At 1:51:08, Rodgers is on the ground and now unarmed, and Officer Waters fires again. At 1:51:10-11, three more muzzle flashes are seen from Officer Waters' weapon. The other officers--except Deputy Farrow, who continues to use the door of his vehicle as a shield--back away as the

incident ends. Rodgers is lying on the ground but is still being pulled by the police dog, which is out of view but evidently has engaged Rodgers' leg. The time elapsed from when Rodgers first appears on the video recording until the firearm is seen leaving his hand is no more than seven seconds.

Rodgers was transported to the hospital and pronounced dead. Examination of the body revealed that Rodgers had been shot multiple times in the head and body. He also exhibited bite marks on his right arm, hand, abdomen, and thigh. It is undisputed that shots fired by Officer Waters killed Rodgers; Deputy Farrow discharged his weapon but did not hit Rodgers, and Officer McFarlane never discharged his weapon.

The Estate subsequently brought this action alleging multiple claims against the officers involved in the shooting, other individuals, and Martin County and the City of Williamston. As is relevant here, the Estate alleged that Rodgers' Fourth Amendment rights were violated by the deployment of the police dog without prior warning and by the use of deadly force by Deputy Farrow and Officer Waters. We address each of these claims below.

II.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U.S. 335,

341 (1986); it protects law enforcement officers from "bad guesses in gray areas" and ensures that they are held liable only "for transgressing bright lines," *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992). Because qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation," *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (internal quotation marks omitted), the question of its applicability should ordinarily be resolved at the summary judgment stage, see *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005).

When a defendant asserts entitlement to qualified immunity, the court must consider two questions. The first is "whether a constitutional right would have been violated on the facts alleged" by the plaintiff. *Saucier,* 533 U.S. at 200. If so, the next question is whether the right asserted was clearly established at the time of the alleged violation. See id. The law is clearly established "not only when the very action in question has previously been held unlawful, but also when pre-existing law makes the unlawfulness of the act apparent." *Meeker v. Edmundson,* 415 F.3d 317, 323 (4th Cir. 2005) (internal quotation marks omitted). On appeal, we review de novo the resolution of these questions by the district court. See *Rogers v. Pendleton,* 249 F.3d 279, 285 (4th Cir. 2001).

The right the Estate alleges was violated here is Rodgers' Fourth Amendment right to be free of unreasonable seizures, a right that includes seizures accomplished by excessive force. See *Jones v. Buchanan,* 325 F.3d 520, 527 (4th Cir. 2003). The test for whether force employed to effect a seizure is excessive is one of

"objective reasonableness under the circumstances." *Graham v. Connor,* 490 U.S. 386, 399 (1989) (internal quotation marks omitted).

A.Excessive Force--Deputy Farrow

The Estate first contends that the district court erred in granting summary judgment to Deputy Farrow. There is no dispute that while Deputy Farrow did fire his weapon, no bullets from that weapon struck Rodgers. Based on this, the district court concluded that Deputy Farrow had not seized Rodgers within the meaning of the Fourth Amendment. The Estate disputes this conclusion, maintaining that it is sufficient that Deputy Farrow intended to achieve Rodgers' submission through the use of force. We disagree.

"From the time of the founding to the present, the word 'seizure' has meant a taking possession. For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control." *California v. Hodari D.,* 499 U.S. 621, 624 (1991) (internal quotation marks & citations omitted; emphasis added). Thus, a seizure occurs only when there is a physical touching or a submission to a show of authority.[3] See id. at 625-26; *United States v. Letsinger,* 93 F.3d 140, 143 (4th Cir. 1996). Here, there was no seizure because the bullets from Deputy Farrow's weapon never touched Rodgers. See *Carr v. Tatangelo,* 338 F.3d 1259, 1267, 1270-71 (11th Cir. 2003) (noting that excessive force claim asserted by individual who was shot at by law enforcement officers, but

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[3]The Estate does not claim that Rodgers submitted to a show of authority by Deputy Farrow, or by any other officer.

not touched by bullets, did not involve Fourth Amendment seizure).

B. Excessive Force--Deployment of Police Dog

The Estate next contends that the district court erred in granting summary judgment on the Estate's claim that Officer Waters unreasonably deployed the police dog without first warning Rodgers. See *Vathekan v. Prince George's County,* 154 F.3d 173, 178 (4th Cir. 1998) ("An attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment excessive force violation.").

This court has twice addressed the constitutionality of the deployment of a police dog without prior warning. In *Kopf v. Wing*, 942 F.2d 265, 266 (4th Cir. 1991), law enforcement officers deployed a police dog without prior warning on two suspects who were hiding in an "extremely narrow passage" between a shed and a fence and who were thought to be armed. This court concluded that the officer responsible for the deployment was not entitled to summary judgment on the basis of qualified immunity, reasoning that failure to provide a warning and time for the suspects to surrender was unreasonable, given that they were surrounded and unable to escape. See id. at 268. In *Vathekan,* the facts viewed in the light most favorable to the plaintiff indicated that a law enforcement officer deployed a police dog, without prior warning, into a residence that he believed had been broken into. See *Vathekan*, 154 F.3d at 176-77. This court concluded that doing so was unreasonable, see id. at 180, and noted that "Fourth Circuit precedent existing in 1995 clearly established that failure to

give a warning before releasing a police dog is objectively unreasonable in an excessive force context," id. at 179.

Citing *Kopf* and *Vathekan,* the Estate contends that deployment of a police dog without a verbal warning is always objectively unreasonable. This cannot be so, however. As noted in *Vathekan* itself, a Fourth Amendment excessive force claim is evaluated under the reasonableness standard set forth in Graham. See *Vathekan,* 154 F.3d at 178; see also Kopf, 942 F.2d at 267-68 (quoting Graham) The application of this test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Thus, Vathekan cannot be viewed as holding anything more than that the unwarned deployment at issue in that case was unreasonable.

Applying this test to the particular facts that faced Officer Waters when he deployed the police dog without first warning Rodgers, we conclude that there was no Fourth Amendment violation. When Officer Waters deployed the police dog, he had heard Officer Brown shout "Gun!", and he observed that Rodgers' right hand was out of view under

his shirt.[4] These observations were combined with Officer Waters' knowledge that Rodgers had kidnaped his girlfriend at gunpoint, had led police on a high-speed chase, and had stopped abruptly in a manner that caused Officer Waters' vehicle to collide with Rodgers' vehicle. At the time of the deployment, Officer Waters was no more than 10 feet away from Rodgers. Officer Waters testified during his deposition that he deployed the dog without warning because "I was close and there was no cover between [Rodgers] and I. And I didn't want to draw any more attention to myself than I had to." J.A. 285. Under these circumstances, we cannot say that Officer Waters' judgment was an unreasonable one. We therefore conclude that there was no Fourth Amendment violation in the manner Officer Waters deployed the police dog.

Even if Officer Waters' deployment of the police dog without prior warning did violate the Fourth Amendment, the unlawfulness of his conduct was not clearly established on April 15, 2002. *Kopf* and *Vathekan* stand at most for the principle that the Fourth Amendment is violated when an officer who faces no immediate threat deploys a police dog without prior warning. For the reasons set forth above, that was not the case here.

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[4]Citing Freeman's statement to the police and her deposition testimony, the Estate asserts that there is "compelling evidence that the unarmed ... Rodgers had his hands in the air when he was viciously attacked by the K-9 Officer." Br. of Appellants at 27. As set forth in Part I.A., however, Freeman's statement and deposition testimony establish that she viewed Rodgers' hands only for a brief period as he began to emerge from his vehicle. The uncontradicted testimony of officers outside the vehicle—who observed Rodgers when Freeman could not--and what can be seen on the videotape indicate that Rodgers' hands were not raised in surrender when the police dog was deployed.

C. Excessive Force--Shooting

The Estate next contends that Officer Waters used excessive force in shooting Rodgers. "The intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner,* 471 U.S. 1, 9 (1985). Nevertheless, a police officer may employ deadly force when the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11; see *Cox v. County of Prince William,* 249 F.3d 295, 299 (4th Cir. 2001).

The record evidence, viewed in the light most favorable to the Estate, supports the conclusion that when Rodgers initially emerged from his vehicle, his hands were up, and they were empty. This much can be reasonably inferred from Freeman's testimony and from the testimony of Officer Brown. We will therefore assume that at that point, the use of deadly force would have violated the Fourth Amendment. However, no deadly force was used then. Rather, the uncontradicted record evidence establishes that at some point after initially emerging from the car, Rodgers acquired his firearm, either by reaching back into the car and grabbing it (as Officer Brown's testimony would indicate), or by some other means (such as removing it from the waistband of his pants, an inference consistent with Freeman's testimony). Further, the uncontradicted record evidence indicates that Officer Brown shouted "Gun!" and, critically, that Rodgers waved the weapon around and pointed it directly at Officer Waters and Deputy Farrow. Indeed, Officer Waters testified that he saw Rodgers point the firearm at him after Rodgers had been engaged by the police dog. When Officer Waters was presented with these

circumstances, he also knew that Rodgers had abducted his estranged girlfriend at gunpoint, had led officers on a lengthy high-speed chase, and had caused one of the pursuing vehicles to crash into his own. We therefore hold that Officer Waters' use of deadly force was not objectively unreasonable in light of the circumstances known to him at the time of the shooting.

The Estate further contends, however, that even if the use of deadly force was justified when Officer Waters fired the initial shots, that justification ended when Rodgers fell to the ground. We disagree. The reasonableness of an officer's actions rests on the information possessed by the officer at the moment that force is employed. See *Elliott v. Leavitt,* 99 F.3d 640, 643 (4th Cir. 1996). Therefore, "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir. 2004); see *Hopkins v. Andaya,* 958 F.2d 881, 887 (9th Cir. 1992) (per curiam) (holding that second use of deadly force was unreasonable when "the exigency of the situation lessened dramatically" after the first use of deadly force).

In *Elliott*, we assessed the reasonableness of the use of deadly force by police officers who had placed a suspect, with his hands cuffed behind his back, in a police cruiser. See *Elliott*, 99 F.3d at 641-42. Moments later, the officers observed the suspect pointing a firearm at them, and they fired 22 shots in a matter of seconds, killing the suspect. See Id. at 642. We rejected the contention that the number of shots fired rendered the use of force excessive, noting that the shooting took place in a matter of seconds. See id. at 643. "That multiple shots were fired does not suggest the

officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat." Id. In contrast, in Waterman we considered a situation in which officers fired at a suspect as he accelerated his vehicle toward and then past them. See *Waterman,* 393 F.3d at 474-75. We held that officers exceeded constitutional bounds by continuing to fire after the vehicle passed them, at which point the officers knew or should have known that the immediate threat of harm had passed. See id.at 482.

We conclude that Elliott is controlling here. The videotape establishes that Rodgers fell to the ground, with his arms in the vicinity of his waist, no later than 1:51:08. At this time, Rodgers appears to be slightly curled up, thus presenting the top or back of his head to Officer Waters. Only two seconds later, at 1:51:10, Officer Waters fires three more shots. Importantly, although Rodgers' firearm left his hands as he fell, nothing in the record indicates that that Officer Waters knew that Rodgers had dropped his weapon, and thus was no longer a threat. We conclude that on this evidence, a reasonable factfinder could only conclude that Officer Waters was acting to ensure the neutralization of a deadly threat.

Even if the second volley of shots were unconstitutional, that unconstitutionality was by no means clearly established as of April 15, 2002. Waterman required us to decide whether it was clearly established in November 2000 that an officer may not use deadly force in the seconds after a serious threat had abated. See *Waterman,* 393 F.3d at 482-83. We concluded that although other circuits had reached this conclusion prior to the relevant time, the Fourth Circuit had not. See id. at 483. In light of the uncertainty of the law existing at the time of the incident, we held that the

unconstitutionality of the use of force in the seconds after a threat has abated was not clearly established. See id. Because the law on this point did not become clear until 2004, when Waterman was decided, we conclude that even if Officer Waters had violated the Constitution, he would be entitled to qualified immunity on the basis that the unconstitutionality of his actions was not clearly established at the time of the incident.[5]

III.

This case is no doubt a tragic one. It is possible, as theEstate contends, that Rodgers was attempting to surrender when he was engaged by the police dog and shot at by the officers. Even if this was the case, however, the circumstances presented to the officers at the outset of the encounter--the kidnapping, the high-speed chase, the wielding of a firearm and pointing it at the officers--gave them probable cause to believe otherwise, and to use deadly force to eliminate a serious and immediate threat to their lives. We therefore affirm the district court.

AFFIRMED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that Deputy Farrow did not seize Rodgers within the meaning of the

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[5]In light of our conclusion that all of the officers involved in the incident are entitled to qualified immunity, the Estate's claims against Martin County Sheriff Keith Roach and against the City of Williamston necessarily fail. See *Kopf*, 942 F.2d at 269 (noting that municipal liability "is derivative of, but narrower than, the officers'").

Fourth Amendment. Accordingly, I concur that this officer is entitled to qualified immunity. However, because I cannot conclude as a matter of law that Officer Waters' deployment of his police dog was objectively reasonable under the circumstances, I dissent from the majority's holding that this defendant is also entitled to qualified immunity. "An attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment violation." *Vathekan v. Prince George's County,* 154 F.3d 173, 178 (4th Cir. 1998). As the majority recognizes, this court has twice addressed the issue of whether releasing a police dog without issuing a prior warning constituted unreasonable deployment. See id.; *Kopf v. Wing,* 942 F.2d 265 (4th Cir. 1991). In both cases, this court concluded that it did. In this case, it is undisputed that Officer Waters deployed his police dog against the decedent without issuing a prior warning. The majority, however, distinguishes the circumstances faced by Officer Waters in this case from those faced by the officers in Vathekan and Kopf, apparently on the grounds that Waters, unlike the officers in those cases, faced an imminent threat of harm. See Op. at 14-15. Accordingly, the majority concludes that it was not unreasonable for Waters to deploy his dog without prior warning. In my view, however, Waters did not face an imminent threat from Rodgers, and, thus, I cannot meaningfully distinguish the circumstances of this case from those of *Kopf.*

Although the majority provides a brief summary of the facts of Kopf, I believe that a more complete recitation is required. After receiving a radio report of an armed robbery, police officers initiated a high-speed pursuit of the vehicle in which the suspects were riding. *Kopf,* 942 F.2d at

266. Shortly thereafter, the suspects abruptly stopped their car and fled on foot. Id. After a cursory search of the vehicle failed to uncover the handgun used in the robbery, the officers reasonably concluded that the suspects likely were armed. Id. Although officers apprehended one of the three suspects during the ensuing foot pursuit, two suspects were able to conceal themselves behind a shed in the backyard of a residential neighborhood. Id. The suspects' hiding place "was an extremely narrow passage between the shed's wall and a fence." Id. After the officers located these defendants and surrounded the shed, one officer deployed a police dog into the passageway without a forewarning. Before the officers entered the passageway, the police dog severely mauled the suspects. See id. at 267.

In reviewing the propriety of the district court's grant of summary judgment in favor of the officer who had deployed the dog, this court concluded that he was not entitled to qualified immunity. Notwithstanding the officer's reasonable belief that the suspects were armed, the court concluded that the officer's failure to provide a warning (and therefore an opportunity to surrender) before deploying the dog was unreasonable. See id. at 268. As the majority recognizes, central to this conclusion was this court's finding that the suspects were surrounded and unable to escape. See id.

The majority relies on Officer Waters' knowledge of the circumstances leading up to the high speed pursuit as well as his statements regarding his perceptions of Rodgers once that pursuit ended to conclude that Waters acted reasonably in deploying his police dog without warning. However, the evidence in the record, when viewed in the

light most favorable to the decedent, portrays a scene indistinguishable from the one faced by the officers in *Kopf*.

The video of this incident indicates that several officers had positioned themselves around the parking lot before Rodgers exited his vehicle. Thus, as in Kopf, the decedent was surrounded and unable to escape. However, the majority concludes that Waters, unlike the officers in Kopf, faced an imminent threat of harm. In so doing, the majority points to Waters' assertions that he heard someone yell "Gun!", that he observed that Rodgers' right hand was out of view under his shirt, and that he (Waters) was so close to the decedent that he had no choice but to deploy his dog without warning. See Op. at 14-15. Viewing the evidence in the light most favorable to the decedent, however, I believe that the majority's reliance on these assertions is misguided. First, as the majority notes, Officer Waters gave two distinctly different versions of what he saw in Rodgers' hand before he deployed the dog. In his initial SBI statement taken shortly after the shooting, Waters asserted that he did not see Rodgers' right hand, but that "it may have been up under his shirt." J.A. 345. Contrarily, in a sworn affidavit, Waters later claimed that Rodgers had "advanced toward [him] with his handgun drawn in a threatening manner." J.A. 135. The patent inconsistency between these two statements undermines the credibility of Waters' assertions as to the imminent threat posed by the decedent.

Second, Officer Waters' and the other officers' actions, as portrayed on the video, provide strong evidence that Rodgers did not have a gun in his hand prior to being engaged by the dog Beginning at 1:51:01, Officer Waters,

without drawing his gun, can be seen rushing across the parking lot to within a few feet of where Rodgers is standing, hurling the dog towards him, and then continuing to advance until he is within inches of Rodgers. Four seconds later, at 1:51:05, Officer Waters, who is now standing in front of Rodgers watching the dog attack, begins to back away from Rodgers (and the dog). Officer Waters does not draw his gun until 1:51:06, when Rodgers, who at this point is desperately attempting to extricate the dog from his leg, reaches towards his waistband.

Had Waters actually heard his fellow officer shout "Gun!" or turned around to see Rodgers pointing a weapon at him, as he later claimed, it is doubtful that the officer would have approached and stood in front of Rodgers in such a vulnerable manner. Further, the video shows that neither Officer McFarlane nor Deputy Farrow has his gun raised at Rodgers as Officer Waters rushes towards him with the dog. Officer McFarlane, who is crouched on the ground with his gun in his right hand, does not raise his weapon at Rodgers until Waters releases the dog (1:51:03), and Deputy Farrow does not draw and aim his gun at Rodgers until five seconds after McFarlane (1:51:08). This is further evidence that Rodgers did not have a gun in his hand prior to Waters' release of the dog.

Finally, Waters' contention that he was so close to Rodgers that he had no choice but to deploy the dog without warning is belied by his actions and previous statement. As noted above, the video shows Waters advancing across the parking lot to within two or three feet of Rodgers before releasing the dog. Further, Waters initially asserted in his SBI statement that, while the high speed pursuit was still in progress, he had radioed the other officers to warn them that

he intended to deploy the dog against Rodgers once the pursuit ended. See J.A. 344. This statement further undermines Waters' claim that he made a split-second decision to deploy the dog based on his close proximity to Rodgers.

In sum, the video portrays a scene where a police officer deployed his dog without warning against a suspect who was completely surrounded and who, as evidenced by the officers' own actions, had not drawn his gun or otherwise endangered his--or his fellow officers'--safety. I, therefore, conclude that Officer Waters' deployment of the dog in this case is not readily distinguishable from the unlawful deployment in Kopf and would hold that Waters is not entitled to qualified immunity.*[6]

As the majority aptly notes, this is a tragic case. I, however, cannot join the majority in concluding that Rodgers' actions in bringing about this encounter justified Officer Waters' subsequent response. Ultimately, viewing the evidence in the light most favorable to the decedent, I believe a jury could conclude that Rodgers got out of his vehicle with empty hands in an attempt to surrender. Although it is undisputed that Rodgers eventually drew a gun, a jury could reasonably find that he did so only after he was attacked by the dog--and only then, in a desperate attempt to defend that attack. But for Officer Waters'

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[6]*The unlawfulness of deploying a dog without prior warning in these circumstances was clearly established by our decision in Kopf, which this court decided eleven years before the events giving rise to this case occurred. Thus, I would also conclude that the decedent has satisfied the second element for defeating qualified immunity as to Officer Waters.

unwarned deployment of the dog, this tragedy may have been averted.

I respectfully dissent in part.

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:03-CV-44-H(3)

ESTATE OF TARIK K. RODGERS,
by and through his administrators
MICHAEL RODGERS and
BRENDA RODGERS; and
BRENDA RODGERS and
MICHAEL RODGERS, as parents
of the decedent,

Plaintiffs,

v.

STEVE SMITH, individually and
in his official capacity as Chief
of Police for the City of Williamston
Police Department, North Carolina;
DONNIE PITTMAN, individually
and his official capacity as the
County Manager for martin County,
North Carolina; KEITH ROACH,
individually and his official
capacity as the Sheriff for Martin
County; WALTER J. FARROW III,
individually and in his official
capacity as a martin County Deputy
Sheriff; WILLIAM WATERS, JR.,
individually and in his official

capacity as a Williamston police officer; MELANIE COX, individually and in her official capacity as a Williamston, North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston, North Carolina police officer; ELVIS FORNEY III, individually and in his official capacity as a Williamston, North Carolina police officer; SCOTT MCFARLANE, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston, North Carolina police officer; TRAVIS COWAN, individually and in his capacity as a Williamston, North Carolina police officer; STACEY PIPPIN, individually and in his official capacity as a Williamston, North Carolina police officer; DAVID CROSS, individually and in his capacity as a Martin County Deputy Sheriff; the CITY OF

WILLIAMSTON, NORTH
CAROLINA, and MARTIN
COUNTY, NORTH CAROLINA,

Defendants.

ORDER

This matter is before the court on defendants' motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs have responded to these motions, and defendants have filed a reply to that response. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiffs filed this action on April 4, 2003, alleging the following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of emotional distress. This court issued an order on March 17, 2004, which dismissed all claims pursuant to Rule 12(b)(6) except those for violations of 42 U.S.C. § 1983 and state law claims for wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress, against the following defendants: the City of Williamston, Sheriff Roach in his individual and official capacities and defendants Smith, Farrow, Waters, Cox, Brown, /Forney, McFarlane, Emondson, Hardison, Cowan, Pippin, and Cross in their individual capacities.

Defendants Roach, Farrow, McFarlane, Edmondson, Pippin, and Cross ("Martin County defendants") filed a motion for summary judgment on December 1, 2004. Defendants Smith,

Waters, Cox, Brown, Corney, Hardison, Cowan, and the City of Williamston("Williamston defendants") filed a separate motion for summary judgment on that same day.

STATEMENT OF THE FACTS

The court states the evidence before the court in the light most favorable to the plaintiffs as follows. Decedent Tarik Rodgers was a black male, age 26, who lived across the street from the Martin County Governmental Center in the Town of Williamston, County of Martin, North Carolina. On April 14, 2002, at approximately 9:00 p.m., a sheriff's deputy served an ex parte domestic violence protective order on Rodgers. That order enjoined him from coming into contact with Angela Freeman, his long-time girlfriend and the mother of his two children. Freeman had sought the protective order in response to a pattern of threatening activity that Rodgers had directed at her, including verbal and physical threats and physical violence.

At approximately 10:00 p.m., Rodgers drove a Mitsubishi Diamante automobile to Freeman's house in order to discuss his parental rights under the protective order. Upset about receiving the protective order, Rodgers forcibly removed Freeman from her home at gunpoint with a Ruger pistol and drove her out to the area of Prison Camp Road in order to discuss the protective order. Defendant repeatedly shoved the fun in Freeman's face. Plaintiffs allege that Rodgers and Freeman determined that their problems resulted in part from a misunderstanding about the protective order. Rodgers stopped threatening her with the gun at that point.

Rodgers and Freeman had consensual sexual relations in the car. Rodgers expressed humiliation at what he had done and that he would not be able to face his children as a result. He asked Freeman to kill him, which she declined to do. Rodgers stated that

he "ought to pull up to the police and provoke them."

Rodgers then began driving back towards the home of Angela Freeman around midnight. After spotting a sheriff's patrol car, he began driving at a very high rate of speed, approximately 110 miles per hour, which attracted the attention of law enforcement. Deputy Sheriff Walter Farrow, one of the Martin County defendants, soon joined the chase, though he was off duty at the time. Williamston police officers William Waters, Elvis Forney, Melanie Cox, Charles Brown, and Roanoke-Chowan Narcotics Task Force Agent Scott McFarlane joined in the chase at the a later time. The officers were aware of a call made to the Williamston Police Department alerting them that a man of Rodgers' description had kidnaped Angela Freeman at gunpoint.

Towards the end of the chase, Rodgers hit the brakes while on Roberson Street in Williamston, which caused one of the police cars to crash into the rear of his vehicle. After the high speed chase, Rodgers stopped his car in a carwash parking lot facing Main Street. Law enforcement officers, including those named as defendants in this action, exited their vehicles and advanced towards Rodgers' car. Rodgers got out of the vehicle.[1] Sgt. Waters released the police dog, though it initially attached drug agent McFarlane by accident, causing minor injury. Sgt. Waters then retrieved the dog off of McFarlane and, without announcement, deployed the dog to subdue Rodgers.

Some of the Williamston officers then shot Rodgers eight times at close range. A gun was visible in Rodgers' hand during the

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[1]Plaintiffs characterize the evidence as supporting the allegation that Officer Brown forcibly and physically removed Rodgers from his vehicle. (Pls.' Mem. At 4.) The cited deposition testimony of Angela Freeman does not support that allegation.

end of the shooting from the police video taken by one of the patrol vehicles. Rodgers died from wounds that the gunshots caused.

COURT'S DISCUSSION

I. Standard of Review

Summary judgement is appropriate pursuant to Federal Rule of Civil Procedure 56 when no genuine issue of material fact exists and the moving party is entitled to judgement as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgement bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. V. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). As this court has stated, summary judgment is not a vehicle for the court to resolved disputed factual issues. See Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. See Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247-248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in

ruling on this motion. Faircloth, 837 F. Supp. At 125.

II. Analysis of the Motion by the Martin County Defendants.

A. Fourth Amendment Violation Claim

Plaintiffs base their claim under 42 U.S.C. § 1983 for a violation of the Fourth Amendment to the U.S. Constitution on an allegation of excessive force used during the course of an arrest. See Graham v. Connor, 490 U.S. 386, 393-94 (1989); see also Saucier v. Katz, 533 U.S. 194, 197 (2001) (modifying the constitutional inquiry used by Graham). Specifically, they contend that unleashing the dog and using deadly force against Rodgers violated his right to be free from an unlawful seizure. Defendants respond that the use of force in that context did not approach Fourth Amendment boundaries, and that the police officers are entitled to the affirmative defense of qualified immunity.

When analyzing a qualified immunity defense with respect to § 1983 claims, courts are to resolve two issues: first, whether the plaintiff stated a violation of a constitutional right; and second, if so, whether that right was clearly established such that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). The purpose of qualified immunity is to "remove most civil liability actions, except those where th4e official clearly broke the law, from the legal process well in advance of the submission of facts to the jury. A police officer should prevail on an assertion of qualified immunity if a reasonable police officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (citations omitted).

The doctrine of qualified immunity provides that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Once an officer has raised the defense of qualified immunity, the plaintiff bears the burden of demonstrating the existence of the clearly established right that he claims was violated. Mitchell v. Rice, 954 F.2d 187, 190 (4th Cir. 1992). To carry its burden, the plaintiff should show that the specific right in issue has been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." Wilson v, Layne, 141 F.3d 111, 114 (4th Cir. 1998), aff'd, 526 U.S. 603 (1999),

Qualified immunity is not merely a defense to liability but "an 'entitlement not to stand trial' that would be 'effectively lost if a case is erroneously permitted to go to trial.'" Lopez v. Robinson, 914 F.2d 486, 489 (4th Cir. 1990) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)); see also Saucier v. Katz, 533 U.S. 194 (2001) (clarifying the distinction between reasonableness analysis under the Fourth Amendment and qualified immunity); Bennett v. Murphy, 274 F.3d 133, 136 (3rd Cir. 2001) (analyzing the doctrine clarified in Saucier). It is therefore a question of law for the court. Pachaly v. City of Lynchburg, 897 F.2d 723, 726 (4th Cir. 1990). Qualified immunity affords "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986),

Thus, this court must determine whether the evidence proffered in this case, taken in the light most favorable to the plaintiffs, could show that the law enforcement officers violated decedent's clearly established Fourth Amendment rights and that no reasonable officer could have acted in the manner that the defendants did.

In evaluating an excessive force claim under the Fourth Amendment, courts apply an objective reasonableness standard to

determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." Cox v. County of Prince William, 249 F.3d 295, 299 (4th Cir. 2001) (citations omitted).

As an initial matter, the court notes that the Martin County defendants have divided their memorandum in support into arguments for defendant Walter Farrow and arguments for the other five defendants. Plaintiffs' memorandum does not address individuals separately in a manner sufficient for the court to discern which defendant they allege was culpable for which action.[2]

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[2]Plaintiffs' memorandum is titled "Plaintiffs' Response to Williamston Defendants' Motion for Summary Judgment." They state, without elaborating, that the motion for summary judgment by the Martin County defendants was nto served according to the Federal Rules of Civil Procedure. They have not made a motion to strike, and ask that their memorandum apply equally to the summary judgment motion of the Martin County defendants. The Martin County defendants filed a Certificate of Service with their motion, signed by counsel Mark A. Davis. Without a clear motion or position by the plaintiffs as to the status of the summary judgment motion by the Martin County defendants, this court will not strike that motion and will consider the plaintiffs' memorandum and accompanying evidence to be opposing both the Williamston defendants' motion and the Martin County defendants' motion. The court notes that Robert A. Berry, to whom the Certificate of Service was directed, has been filing motions on behalf of the plaintiffs, who have changed attorneys at least once. (See Pls.' Mot. for Change of Local Counsel at 2; Order of Nov. 14, 2003.); Local Rule 83.1(g).

Defendants have also submitted affidavits that describe what each claims to have done during the incident.

1. Defendant Farrow

This court construes the evidence in the light most favorable to the plaintiff, but it does not ignore uncontradicted evidence that defendants have tendered. See, e.g., Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1987) (holding that summary judgment involves looking at the record submitted "as a whole"). Defendant Farrow's affidavit indicates that he discharged his weapon but did not actually shoot the decedent. (Aff. Of Farrow ¶ 6; Aff. of Trochum ¶¶ 3-8.) Plaintiffs have not come forth with any evidence that any bullets from Farrow's gun touched the decedent, nor have they constructed an argument that would impeach Farrow's story. For that reason, the court must turn to the question of whether Farrow's conduct even implicated the Fourth Amendment as being a "seizure." U.S. Const. Amend. IV.

A seizure occurs within the meaning of the Fourth Amendment only where a person is physically touched or restrained by a show of force. California v. Hodari D., 499 U.S. 621, 624 (1991). Using deadly force to detain someone does constitute a seizure under settled doctrine, id. at 644 (Stevens, J., dissenting), but merely using deadly force in an unsuccessful attempt to detain or subordinate a person does not constitute a seizure. Id. at 628-29.

In this case, there is no evidence that defendant Farrow's use of deadly force actually resulted in the decedent's eventual seizure, and plaintiffs have not offered a legal theory that would implicate liability against him under clearly established federal constitutional doctrine.

Accordingly, summary judgment as to defendant Farrow for the § 1983 claim is GRANTED.

2. Defendants McFarlane, Edmondson, Cross, Pippin and Roach

Defendants McFarlane, Edmondson, Cross, Pippin, and Roach all assert that they had no direct involvement in the use of deadly force against the decedent. (Aff. of McFarlane ¶ 9; Aff. of Emondson ¶ 3; Aff. of Cross ¶ 10; Aff. of Pippin ¶ 3; Aff. of Roach ¶ 3.) Thomas Trochum, a ballistics expert with the State Bureau of Investigation, has testified that no evidence exists which would link the above defendants to the use of deadly force. (Aff. of Trochum ¶¶ 3-8.)

Plaintiffs have not submitted evidence to the contrary, nor have they impeached the above evidence that these defendants did not seize the decedent with deadly force.

Accordingly, the summary judgment as tot he defendants McFarlane, Emondson, Cross, Pippin, and Roach for the § 1983 claim is GRANTED.

B. Claims for Gross Negligence, Wrongful Death, and Punitive Damages: Public Officer Immunity.

All Martin County defendants move for summary judgment as to the state law claims on the basis that North Carolina shields law enforcement officers from liability under the common law doctrine of public officer's immunity.

The doctrine of "public officer's immunity" under state law is parallel in nature to the doctrine of qualified immunity under federal law. Bailey v. State, 330 N.C. 227, 245, 412 S.E.2d 295, 306 (N.C. 1991), cert. Denied, 504 U.S. 911 (1992), overruled on other grounds, Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (N.C. 1998), The doctrine states that a public official, engaged in the performance of governmental duties involving judgment and discretion, may not be held personally liable for conduct "within the scope of his official authority." In the Matter of Grad v. Kaasa, 312

N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1981); see also Smith v. Hefner, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (N.C. 1952) (immunity for negligence). Such officials may only be held liable for corrupt and malicious actions, or those outside the scope of their duties. In the Matter of Grad v. Kaasa, 312 N.C. at 313. A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty. Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1984). Furthermore, "[m]ere allegations of malice without more are insufficient to overcome a motion for summary judgment" based on public officer's immunity. Slade v. Vernon, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (N.C. App. 1993) (citing Nasco Equip, Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (N.C. 1976).

In this case, plaintiffs have not rebutted the arguments and evidence of the Martin County defendants that their actions did not constitute malicious conduct. Plaintiffs' response memorandum treats all defendants as an undifferentiated group with equal culpability. The Martin County defendants, on the other hand, sate that they did not shoot the decedent and did not release the K-9 officer on him. This contention goes unrebutted. There is no other factually supported allegation in the response which would connect the Martin County defendants to any malicious conduct - either allegations directed towards all defendants. Plaintiffs have essentially ignored the common law affirmative defense to the state law claims in their opposition memorandum.

In addition, the court notes that there is extensive evidence of reasonable fear on the part of law enforcement officers and defendant Farrow in particular. The evidence shows: there had been a call to the Williamston Police Department reporting Rodgers as having kidnaped Angela Freeman; Rodgers was driving at an extremely high rate of speed while being pursued by law enforcement; and, a Williamston police officer and defendant,

Charles Brow, had yelled "Gun!" as Rodgers exited the vehicle. Even disregarding the issue of whether Brown was reasonable to have alerted the other officers to the alleged possession of a firearm by Rodgers, such a circumstance, viewed from the perspective of Farrow, in the context of an attempted arrest such as this one, creates objectively reasonable fear for personal safely. N.C. Gen. Stat. § 15A-401(d).

The court does not need to reach the question of whether determining the facts surrounding a question of common law public officer's immunity is a matter for the court, which the parties have not briefed. Even with the facts construed in the light most favorable to the plaintiff, the above set of circumstances creates a situation where a reasonable police officer would consider himself and other in the vicinity at risk of imminent harm and justified in using deadly force. No reasonable fact-finder would conclude otherwise. In other words, defendant Farrow's actions, far from being malicious so as to penetrate common law officer immunity, were objectively not unreasonable. Such conduct does not support a claim for gross negligence, see Bullins v. Schmidt, 322 N.C. 580, 583, 360 S.E.2d 601, 603 (N.C. 1988) (requiring wanton or reckless conduct), or wrongful death under N.C. Gen. Stat. § 28A-18=2(a). Sigman v. Town of Chapel Hill, 161 F.2d 782, 789 (4th Cir. 1998) (objectively reasonable conduct by police officer defeats claim as a matter of law).

Accordingly, summary judgment as to all state law claims against the Martin County defendants is GRANTED.

III. Williamston Defendants

A. Fourth Amendment Violation Claim

The Williamston defendants raise substantially similar arguments as the Martin County defendants on their motion for summary judgment. The difference between the two groups is that

the fatal shots were fired by the Williamston officers, according to the uncontradicted affidavits and deposition testimony. In addition, the police dog was released from within the authority of the Williamston defendants. Because these events are what precipitated the substance of the lawsuit, the issues involved in the Williamston defendants' motion differ from the analysis in Part II.

As stated previously, the plaintiffs do not differentiate between defendants in their memorandum in opposition, nor do they assert a theory of joint and several liability or res ipsa loquitur which would allow a discussion of the police actions without regard tot he individuals' actions. With that in mind, the court will accept as uncontroverted the statements of defendants Waters, Brown, Farrow, and Forney in regards to which defendants took what action in terms of encouraging the decedent to get out of the car, unleashing the police dog, alerting law enforcement to the apparent existence of a deadly weapon by the decedent, and firing the fatal shots. Officer Brown commanded the decedent to exit the vehicle and yelled, "Gun!" Officer Walker unleashed the dog. Officer Waters fired shots at the decedent. Other Williamston police officers discharged their weapons, but the court is not prepared to list them definitively, given the state of the evidence as submitted.

1. Use of the Police Dog

The court turns first to the unleashing of the canine on the decedent. Plaintiff cites two Fourth Circuit cases, Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998), and Kopf v. Wing, 954 F.2d 265 (4th Cir. 1991), in support of his contention that unleashing a police dog on a civilian without a prior warning is "objectively unreasonable," (Pls.' Mem. in Opp. At 14.) Defendants urge the court to distinguish the facts of this case from the cases that plaintiffs cite.

The apparent confusion results from the following statement

in Vathekan: "Fourth Circuit precedent existing in 1995 clearly established that failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context. Kopf, 942 F.2d at 266, 268." Vathekan, 154 F.3d at 179. Plaintiffs urge the court to regard this statement as a blanket rule on the use of police dogs. That would be inappropriate. Appellate opinions are not statutes to be applied rigidly accordingly to the rules of statutory construction. Cf. Engine Mars. Assn v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 124 S. Ct. 1756, 1761 (2004). Rather, they are guides which are binding on the district court but which are not legislative in nature.

Vathekan was citing Kopf in support of its holding that, where a police dog was unleashed in a house and eventually found and mangled a sleeping woman, summary judgment in favor of the defendant is inappropriate on Fourth Amendment grounds. Id. At 179. Kopf involved the allegedly unannounced unleashing of a dog on a fleeing suspect where there was not an allegation that the police were at risk of imminent harm. Kopf, 942 F.2d at 266. The relevant statement from the opinion in Kopf is as follows: "We believe that a jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog" attacks and subdues the suspect, where the suspect is already surrounded. Id. at 268.

Vathekan cited Kopf in reference to whether the given Fourth Amendment right involved was "clearly established: at the time, so as to abrogate qualified public immunity. Vathekan, 154 F.3d at 179. This court believes that Vathekan did not drastically extend the holding in Kopf so as to create a blanket per se rule, as plaintiffs read the case. Rather, it was citing Kopf to demonstrate that the unannounced use of a police dog on a suspect that did not manifest any immediate danger to surrounding persons could violate the Fourth Amendment. To the extent that the statement

appears to have been imprecisely drafted in the opinion, a careful reading of both Vathekan and Kopf, as well, as others discussing them, convincingly shows that no such rule arises from those cases. See, e.g., Szabla v. City of Brooklyn Park, 2004 U.S. Dist. LEXIS 9013, at 14 (D. Minn. May 18, 2004) (discussing Kopf and Vathekan and concluding that no per se rule arises from them). Moreover, to the extent that Vathekan decided issues far beyond the facts of the case, it would generally be dicta, especially viewed in light of the U.S. Supreme Court's holding that excessive force cases are inherently fact-intensive and require individualized determination based on the risks and circumstances that the law enforcement officer faced. Graham v. Connor, 490 U.S. 386, 396 (1989).

In this case, defendant Waters, the officer in charge of the police canine, faced the following scene, viewed from the uncontradicted facts. A call had been made to his department concerning an armed kidnaping by the decedent. (See, e.g., Aff. of Cross ¶ 4.) The police alert included the assertion that Rodgers had threatened to shoot Angela Freeman. (PLS.' Expert Witness Disclosure by Klotz at 3.) The decedent had engaged multiple law enforcement vehicles on an exceedingly high speed chase in excess of 100 miles per hour. The decedent got out of the car, also occupied by Angela Freeman, the person he hd been reported to have kidnaped. Another officer yelled, "Gun!". In those circumstances, the facts need not show that Waters saw this gun before unleashing the police dog to neutralize the supposed threat.

Even if the other officer wrongly identified a deadly weapon, the court will no second-guess an officer's use of deadly force in the above situation and must, instead, grant qualified public immunity protection from standing trial. See Sigman v. Town of Chapel Hill, 161 F.3d 782, 786 (4th Cir. 1998). A police officer is not required to "detect the presence of an object in a suspect's hands

before firing on him." Id. at 788. Where the events, viewed from the officer's perspective, show a considerable risk of harm to himself and others, the use of force to stabilize the situation is within the police officer's discretion under qualified public immunity. Id. The parties have not discussed whether the police dog should be considered deadly force, see Jarrett v. Town of Yarmouth, 331 F.3d 140, 2003 U.S. App. LEXIS 8606 (1st Cir. 2003), and such analysis is not necessary to this decision. Waters was entitled to use deadly force in his discretion. The risks he reasonably perceived immunize him from further Fourth Amendment scrutiny.

Plaintiffs vaguely assert that the police officers did not follow established procedures in utilizing the K-p officer. (PLS.' Mem. in Opp. At 16.) Presumably, this factual assertion refers to the equally vague statement in the expert witness disclosure of Robert W. Klotz that "it appears...the release of the canine was contrary to the department's directive on the use of the canine." (Report of Klotz at 4 n.4.) This allegation, without more, does not create an issue under federal law. There is no analysis as to how this apparent defect in following the established local procedure wou8ld call into question the use of a canine to counteract the reasonably perceived threat of deadly force by the decedent. In addition, a local police department does not heighten its own exposure to federal liability merely by establishing guidelines on the use of force which might be more exacting than the federal Fourth Amendment privilege.

Accordingly, defendant Waters' motion for summary judgment as to the claim for a violation of the Fourth Amendment and 42 U.S.C. § 1983 is GRANTED.

2. Use of Guns Resulting in Death

The use of deadly force by one or more of the other

Williamston officers, given the above situation, was similarly within their discretion. Where the officers are confronted with a situation involving a reported armed kidnapper who engaged the police on a high-speed chase and another officer signals the suspect's possession of a firearm, this court, given the Fourth Circuit case law analyzed in supra, should grant summary judgment on the grounds of qualified public immunity.

In this respect, the case before the court is very similar in its essential facts to McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994). In that case, probable cause to believe the decedent was armed and immediately dangerous constituted sufficient grounds to use lethal force against him. Id. at 1006-07. This case presents facts more favorable to the Williamston defendants, because here the decedent was actually found to have a gun, unlike in McLenagan, where the officer only reasonably believed the decedent was armed. While the facts of these cases are never precisely aligned with on another, this holding is in accordance with controlling case law in this circuit. Accord Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996); Sigman v. Town of chapel Hill, 161 F.3e 782, 786 (4th Cir. 1998); ''Wyche v. City of Franklinton, 837 F. Supp. 137 (E.D.N.C. 1993),

For these reasons, the motion for summary judgment by defendants Smith, Waters, Cox, Forney, Hardison, and Cowan - all Williamston defendants except Officer Brown - is GRANTED as to all federal rights claims under 42 U.S.C. § 1983 for the shooting of Tarik Rodgers.

3. Alert as to the Presence of a Deadly Weapon

The actions of Officer Brown - specifically, his yelling, "Gun!" - require additional analysis. Plaintiffs refer to the circumstances leading to the shooting of Tarik Rodgers as "Kafkaesque" (PLS.' Mem. in Opp. At 17) in that, according to

their version of the events, the police officers themselves instigated a confusing situation that precipitated the perceived need to use deadly force. The evidence is viewed in the plaintiffs' favor. Therefore, the uncontradicted fact that triggered and justified the release of the dog and the shooting of the decedent was Brown's alert as to the presence of a weapon. Officer Brown acted partly as the eyes for the other officers, and so if he falsely and maliciously alerted the other officers to the presence of a deadly weapon so as to invite them to shoot Rodgers, his qualified public immunity would clearly be abrogated.

In this motion for summary judgment, defendants are not entitled to their factual assertion that the officers all saw the gun before killing the decedent. Affidavits that state that the officers saw a gun prior to discharging a weapon are subject to the jury determining their credibility. The video, on the other hand, is conclusive as to the events it captured. Unless the plaintiffs have some articulable and factually supported means to impeach its authenticity. Accord Stewart v. Prince George's County, 2003 WL 22179057, at *1, *3, 75 Fed. Appx. 198 (4th Cir. Sep. 23, 2003).

Plaintiffs base their scenario on two factually untenable propositions. First, they inaccurately cite and interpret the deposition testimony of Angela Freeman, who was in the passenger's seat during the altercation. Their contention is that Freeman's testimony supports the proposition that "[d]ecedent exited his vehicle without a gun and with both hands raised.: (PLS.' Mem. in Opp. At 9.) Freeman's deposition, rather, states the following:

Q: And when he got out of the car you don't know one way or the other whether he had the gun, right?

A: When he got out of the car he had nothing in his hands, his hands were up.

Q: But you don't know whether he had the gun on him or not?

A: I never saw the gun.

Q: So you don't know whether he had it with him or not?

A: No.

(Dep. of Freeman at 42.) In other words, Freeman stated that she did not see a gun with him when he got out of the car.

Second, plaintiffs dispute that the video shows a gun in the hands of the decedent and view the matter as a "genuine issue" of fact, Fed. R. Div. P. 56, for jury deliberation. This court does not agree. Under the United State Supreme Court's interpretation of the standard governing summary judgment, a court is not required to suspend all disbelief regarding an external factual matter. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 , 587 (1985); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1985). Summary judgment is designed to narrow the issues to those about which reasonable people could differ. To that extent, the court must defer to the province of the jury but need not go outside the bounds of a reasonable assessment of the evidence.

In this case, the video shows that a gun-shaped object flew from the hands of the decedent as he fell to the ground. The uncut version of the video shows an officer picking up the object after the conclusion of the altercation, which shows more clearly that the object was in the shape of the fund and appeared to be metallic. Additionally, the police reports of the incident refer to the object as a fun. Lastly, all that is required to confirm the reasonableness of the defendants' perceptions about the object is that it appeared to be a gun, not its actual nature or whether it could be fired.

Furthermore, plaintiffs cannot create a material factual dispute from the minor differences in recollection regarding the color of the gun in the officers' depositions and affidavits. The fact

that one officer referred to it s silver in nature whereas another recalled it to be black, when the gun was both silver and black, it not a material issue of fact.

The court is therefore left with the following facts in the light most favorable to the plaintiffs that a reasonable jury could so find. Rodgers was reported to have kidnaped someone with a weapon. His car was positively identified and engaged the police officers on a high-speed chase. Rodgers stopped, precipitating a car crash. He got out of the car with his hands up, and Freeman, who was in the car, did not see a gun in his hands.[3] An officer yelled "Gun!" and a police dog was unleashed. Rodgers was soon shot multiple times. During the course of the shooting, the video shows that he emerged from behind the car with a gun in his right hand.

The only remaining question is how the gun got into his hands in the few moments between when he got out of the car and when he emerged from behind the police vehicle into view from the police video camera, a camera which showed him holding a fun-shaped object. On this point, the plaintiffs bear the burden to proffer some coherent factual explanation that would support a finding of liability. See Celotex Corp., 477 U.S. at 325 (1986) (holding that the plaintiff bears the ultimate burden of showing a genuine factual issue for trial). Plaintiffs have not done so. Their principal factual assertion is that the decedent did not have the gun when he exited the car, and he did not have a gun, or anything that would justify the use of deadly force, when he was videotaped being shot a few moments later. That interpretation of the video does not survive reasonable scrutiny, as stated above. The court is

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[3]The part of the Freeman deposition which discusses this issue concerns her testimony on the S.B.I. interview record, taken at 8:15 a.m. on April 15, 2002, the morning after the incident. (Martin County Defs.' Mot. For Summ. J. Ex. A.)

therefore left with no plausible scenario for the jury to evaluate.

Likewise, plaintiffs have not given any alternative explanation for Officer Brown's having yelled "Gun!". Given that qualified public immunity is a right not to stand trial, plaintiffs must come forth with some plausible and factually supported inference that would penetrate his immunity and impeach the evidence, given that he has offered a reasonable version of the facts. The parties have not briefed the issue of which party bears the burden of persuasion and the burden of production regarding qualified public immunity, but the court does not need to reach that issue. Even if defendant Brown bears both burdens, he has carried them.

Accordingly, defendant Charles Brown's motion for summary judgment as to the claim for a violation of the Fourth Amendment pursuant to Title 42 U.S.C. § 1983 is GRANTED.

B. State Law Public Officer Immunity

The analysis under North Carolina common law for the Williamston defendants does not differ significantly from that for the Martin County defendants. The Williamston defendants will not be liable as a mater of law for any of their actions within their legal authority, so long as such acts were not malicious. In the Matter of Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1981),

In this case, the plaintiffs have not come forth with any evidence that would suggest malicious intent, nor have they advanced any plausible inference of malicious intent. Allegations in the complaint, standing alone, are not sufficient to withstand a properly supported motion for summary judgment. Celotex Corp., 477 U.S. at 325 (1986).

Accordingly, the Williamston defendants' motion for summary judgment as to the claims for assault, battery, gross negligence, and intentional infliction of emotional distress is

GRANTED.

CONCLUSION

For the foregoing reasons, the court GRANTS the motion for summary judgment by defendants Roach, Farrow, McFarlane, Edmondson, Pippin, Cross, Smith Waters, Cox, Brown, Forney, Hardison, Cowan, and the City of Williamston as to the claims for violation of 42 U.S.C. § 1983, wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress.

The clerk is directed to close his case.
This 1st day of March, 2005

MALCOLM HOWARD
United States District Judge

At Greenville, NC
#28

IN THE *UNITED STATED DISTRICT COURT*
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:03-CV-44-H(3)

ESTATE OF TARIK K. RODGERS,
by and through his administrators
MICHAEL RODGERS and
BRENDA RODGERS; and
BRENDA RODGERS and
MICHAEL RODGERS, as parents
of the decedent,

Plaintiffs, **ORDER**

v.

STEVE SMITH, et al.,

Defendants.

This matter is before the court on defendants' partial motions to dismiss. Plaintiffs have responded and defendants have replied. This matter is ripe for consideration.

STATEMENT OF THE CASE

Plaintiffs filed this action on April 4, 2003, alleging the following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of

emotional distress.[1] These claims stem from an incident in which members of the Martin County Sheriff's Department and the Williamston Police Department allegedly shot and killed Tarik K. Rodgers ("Rodgers"). On April 17, 2003, the Martin County defendants[2] filed the present partial motion to dismiss. On May 30, 2003, the Williamston defendants[3] filed a partial motion to dismiss.

STATEMENT OF THE FACTS

Plaintiffs; complaint alleges the following facts. Decedent Rodgers was a twenty-six year old black male at the time of the events in the complaint. On April 24, 2002, a domestic violence protective order was served on Rodgers. Shortly after receiving the protective order, Rodgers went to the home of Angela Freeman, the mother of his two daughters, in order to discuss his parental rights. That night, Rodgers and Freeman left Freeman's residence together in Rodgers' vehicle. At about 12:30 a.m., Freeman exited Rodgers'

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[1]Though plaintiffs' fifth claim for relief is titled "Punitive Damages", the body of this claim states that defendants committed assault, battery, and outrage. The court will treat this claim as alleging the torts of assault, battery, and intentional infliction of emotional distress, with a request for punitive damages.

[2]The Martin County defendants include Martin County, County Manager Pittman, Sheriff Roach, and Deputy Sheriffs Farrow, McFarland, Edmondson, Pippin, and Cross.

[3]The Williamston defendants are the remaining defendants. The Williamston defendants include the City of Williamston, Chief of Police Smith, and Police Officers Waters, Cox, Brown, Forney, Hardison, and Cowan.

vehicle to place a telephone call from a nearby business to Rodgers' parents' residence, and then returned to the car. At some point between 12:30 and 1:30 a.m., members of the Williamston Police Department and the Martin County Sheriff's Department engaged in a high speed pursuit of Rodgers' vehicle. Officer Waters' vehicle collided with Rodgers' vehicle. Officer Brown approached Rodgers' vehicle and used his service revolver to knock on the driver's side window. When Rodgers opened the door to his vehicle, Brown attempted to remove Rodgers from his vehicle by grabbing Rodgers' clothing. Rodgers was wearing his seat belt at the time, and when Rodgers reached to disengage his seat belt, Brown shouted "gun". Rodgers exited his vehicle with his hands up and without a weapon of any kind. Waters then deployed a police dog, who attacked Rodgers. Officer Waters and Deputy Sheriffs Farrow and McFarland drew their weapons suddenly and without warning, and fired shots at point blank range into Rodgers' head and torso, striking him eight times. The shots perforated Rodgers' heart, brain, and lungs, killing him. Afterwards, the officers and deputies moved Rodgers' corpse out of the range of the video cameras located on the police cars, and handcuffed the corpse. They also moved evidence present at the scene. Shortly after Rodgers' death, the officers and deputies were seen talking and laughing in a group.

Plaintiffs allege that the shooting and other unlawful acts were racially motivated. They claim that the Police Department and the Sheriff's Department have established and condones a pattern and practice of treating black citizens with more contempt and disrespect than they treat white citizens.

COURT'S DISCUSSION

I. Standard of Review

In reviewing a motion to dismiss, the court should view the allegations of the complaint in the light most favorable to the plaintiff. See De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991). The court must accept the factual allegations of the complaint but is not bound with regard to its legal conclusions. See United Mine Workers v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979). Plaintiffs are entitled to reasonable inferences by the court in ruling on a motion to dismiss. See Mylan Lab. V. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). However, where a plaintiff's claim against a defendant consists entirely of conclusory allegations unsupported by factual assertions, such pleading fails even the liberal standard of Rule 12(b)(6) and must be dismissed. Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993).

II. Analysis

A. Claims against Martin County and County Manager Pittman

Plaintiff's complaint names Martin County and County Manager Pittman as defendants in addition to Sheriff Roach of Martin County. Plaintiff argues that the county and the county manager should be held liable for inadequate training of the Martin County defendants. A county or county official may be held liable only for acts over which the county or official has final policy-making authority. See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988), cited in Worrell v. Bedsole, No. CA-94-778-5-F, 1997 WL 153830 at *5 (4th Cir. April 3, 1997); see also Olvera v. Edmundson, 151 F. Supp. 2d 700, 705 (W.D.N.C. 2001); Little v. Smith, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000). Whether a

county or county official has final policy-making authority in a specific area is a question of state law. City of St. Louis v. Praprotnik, 485 U.S. at 123. In North Carolina, the sheriff retains the exclusive responsibility for training and supervising employees in the Sheriff's Department. See N.C. Gen. Stat. § 153A-103 (stating that the sheriff "has the exclusive right to hire, discharge, and supervise the employees in his office"); Clark v. Burke County, 450 S.E.2d 747, 749 (N.C. Ct. App. 1994) (stating that "the control of employees hired by the sheriff is vested exclusively in the sheriff"); Olivera v. Edmundson, 151 F. Supp. 2d at 705 (stating that "[b]ecause training and supervision constitutes 'personnel decisions' for purposes of determining who possesses policymaking authority, the County is entitled to dismissal"). The sheriff may not delegate this authority to another person or entity. N.C. Gen. Stat. § 162-24.

In this case, it is clear that neither Martin County nor the County Manager Donnie Pittman has policy-making authority over the training and supervision of employees of the Sheriff's Department. Thus the court will grant defendants' motion to dismiss as to these defendants.

B. Claims Against the Chief of Police, the Police Officers, and the Deputy Sheriff in Their Official Capacities

In addition to naming the City of Williamston and Sheriff Roach of Martin County as defendants, plaintiffs' complaint names the police chief of Williamston, several Williamston police officers, and several Martin County deputy sheriffs. Defendants argue that the court should dismiss the claims against these officials because such claims are redundant. While individual capacity suits seek to impose personal liability upon a government officer for actions he takes under color of state law, official capacity suits against an

officer are generally treated as suits against the governmental entity of which the officer is an agent, Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Monell v. Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978) *stating that suits against officers in their official capacities "represent only another way of pleading an action against an entity of which as officer is an agent").

In Jackson v. Granville County, the court noted that under North Carolina law, the deputy sheriffs are employees of the sheriff. Jackson v. Granville County, No. 5:02-CV-899-BO(3) (E.D.N.C. March 4, 2003). It then dismissed the claims against the deputy sheriffs, stating that "[b]ecause the sheriff...is already a named defendant in this action, Plaintiff's claims against the deputies in their official capacities are redundant and unnecessary to the relief sought by Plaintiffs." Id. Similarly, in Davidson v. Wightman, this court found that claims against the police chief in his official capacity are properly treated as claims against the city. Davidson v. Wightman, No. 4:01-CV-79-H4 (E.D.N.C. Sept. 4, 2001). As in Jackson and Davison, the claims against the deputy sheriffs, chief of police, and police officers in their official capacities are redundant and unnecessary and the court therefore will dismiss these claims.

C. Claims Against Deputy Sheriffs Edmondson, Pippin, and Cross in Their Individual Capacities

Defendants argue that plaintiffs have failed to state a claim against deputy sheriffs Edmondson, Pippin, and Cross, in their individual capacities, in that plaintiffs have failed to allege any specific wrongful conduct by these defendants. In paragraphs 42, 61, 62, 65, 66, 67, and 98 of plaintiffs' complaint, plaintiffs seem to allege that all defendants participated in the high speed chase, in handcuffing and moving the decedent's body, and in disturbing the physical evidence at the scene. While a more specific showing

might be required to prevail at trial or to withstand summary judgment plaintiffs' allegations are adequate at this stage. The court will therefore deny defendants' motion to dismiss as these defendants.

D. Section 19 8 Claims

Defendants argue that the court should dismiss plaintiffs' claims alleging violations of 42 U.S.C. § 1985, conspiracy to interfere with civil rights, because defendants' allegations are vague and conclusory. The court agrees.

In order to state a claim under 42 U.S.C. § 1985, a plaintiff must prove: "(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidious discriminatory animus to (3) deprive plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995). For claims under 42 U.S.C. § 1985, a plaintiff must plead specific facts in a nonconclusory fashion to withstand a motion to dismiss. Id. The Fourth Circuit has rarely found that a plaintiff has set forth sufficient facts to establish a conspiracy claim. Id.

Plaintiffs allege in a conclusory manner that defendants were motivated by racial bias and by the police department's and the sheriff's department's policies of racial discrimination. However, plaintiffs do not set forth any facts or forecast any evidence that would tend to support the allegations that the shooting of Rodgers was motivated by racial prejudice. See Gooden v. Howard County, Md., 954 F.2d 960, 970 (4th Cir. 1992) (finding that the mere statement that the officers were white and the plaintiff was black was insufficient to support plaintiff's § 1985 claim); Thomas v. Roach, 165 F.3d 137, 147 (2d Cir. 1999) (affirming

summary judgment dismissal of § 1985 claims against officers who shot arrestee because plaintiffs failed to sufficiently allege facts showing that the officers selected their course of action based on arrestee's race or facts showing the existence of an agreement).

Furthermore, in order to state a claim for a conspiracy under § 1985, a plaintiff "must show an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." Simmons v. Poe, 47 F.3d at 1376. "Without such a meeting of the minds, the independent acts of two or more wrongdoers do not amount to a conspiracy." Sales v. Murray, 862 F. Supp. 1511, 1517 (W.D. Va. 1994) (citing Murdaugh Volkswagen, Inc. V. First Nat'l Bank of S.C., 639 F.2d 1073, 1076 (4th Cir. 1981)). The facts of plaintiffs' complaint, taken as true, suggest that two or three officers shot Rodgers and that other officers also engaged in unlawful acts. None of the events discussed in the complaint suggest that the defendants in any agreed to violate Rodgers' rights. Thus, the "meeting of the minds" element is lacking. Plaintiffs'' allegation that the defendants conspired against Rodgers is conclusory and insufficient as a matter of law to state a conspiracy claim under § 1985.

E. Claims by Michael and Brenda Rodgers as Parents of the Decedent

Defendants argue that only the personal representatives of a decedent's estate may pursue a civil action on behalf of the decedent, and that the court therefore should dismiss the claims by Michael and Brenda Rodgers in their capacities as the decedent's parents. The court agrees.

North Carolina law determines the survivability of causes of action under 42 U.S.C. § 1985 and under state law. Dean v. Shirer, 547 F.2d 227, 229 (4th Cir. 1976). Under N.C. Gen. Stat. § 28A-18-1(a), all claims that exist in favor of a decedent survive to the

personal representative or collector of his estate. Similarly, N.C. Gen. Stat. § 28A-18-3 provides that all actions brought by the personal representatives of an estate "upon any cause of action or right to which the estate of the decedent is the real party in interest" must be brought by them in their representative capacity. Though the real parties in interest as to the wrongful death claim are the beneficiaries of decedent's estate, North Carolina law provides that only the representative of the decedent's estate has the right to bring action for the wrongful death of the decedent. See N.C. Gen. Stat. § 28A-18-2 (stating that actions for the wrongful death of a person are to be brought by the personal representative or collector of the decedent); Burcl v. N.C. Baptist Hospital, Inc., 293 S.E.2d 85, 87 (N.C. 1982) (stating that "[p]arents may not maintain (wrongful death actions in their individual capacities for deaths of their children"); Bowen v. Constructors Equip. Mental Co., 196 S.E.2d 789, 803 (N.C. 1973) (stating that though a wrongful death action may be brought only by the representative of the decedent's estate, the real parties in interest are those entitled to recover under the Intestate Succession Act). As North Carolina law is clear that only the personal representatives of a decedent's estate may bring an action on behalf of the decedent, the court will dismiss all claims by Michael and Brenda Rodgers in their capacities as parent of the decedent.

CONCLUSION

For the foregoing reasons, the court hereby GRANTS Defendants' motions to dismiss as to the following claims:

1. All claims against defendants Martin County and Pittman;
2. All claims against defendants Smith, Farrow, Waters, Cox, Brown, Forney, McFarland, Edmondson, Hardison, Cowan, Pippin, and Cross, in their official capacities;
3. All claims pursuant to 42 U.S.C. § 1985; and
4. All claims by Michael and Brenda Rodgers as parents of the decedent.

The court hereby DENIES defendants' motions to dismiss as to Deputy Sheriffs Edmondson, Pippin, and Cross in their individual capacities.

The claims that remain before this court for adjudication are those brought by the estate of Tarik K. Rodgers for violations of 42 U.S.C. § 1983, wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress, against the following defendants: the City of Williamston, Sheriff Roach in his individual and official capacities, and Smith, Farrow, waters, Cox Brown, Forney, McFarland, Edmondson, Hardison, Cowan Pippin, and Cross in their individual capacities

This 16th day of March, 2004

MALCOLM J. HOWARD
United States District Judge

At Greenvile, NC
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